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# Taxation

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# TAXATION

by

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and

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## I. SALES TAX

### A. Application of the Tax

**I**N *Texas Monthly, Inc. v. Bullock*<sup>1</sup> the United States Supreme Court held the Texas sales tax exemption for religious periodicals<sup>2</sup> unconstitutional. Reversing the Texas appeals court,<sup>3</sup> the Supreme Court concluded that the state lacked a secular motive to justify its exemption for religious periodicals and that the exemption violated the Establishment Clause, and was not required by the Free Exercise Clause of the United States Constitution.<sup>4</sup>

*Spencer Gifts, Inc. v. Bullock*,<sup>5</sup> the only other reported Texas sales tax case during the survey period,<sup>6</sup> concluded that "postage and handling" charges for which Spencer charged its customers were not exempt transportation charges for purposes of Section 151.007 of the Tax Code.<sup>7</sup> Spencer had argued that these charges constituted separately stated, nontaxable transportation charges, and that the comptroller's method of classifying transportation charges denied Spencer its rights to equal protection and uniform taxation under state and federal constitutions. Noting that an agency's interpretation is entitled to weight, but does not bind the court,<sup>8</sup> the appeals court determined that the charges labeled as "postage and handling" on Spencer order forms for its customers included some non-transportation activities. Since Spencer had failed to state separately its transportation charges to its cus-

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1. 109 S. Ct. 890, 905 (1989) (the majority was divided in its reasoning and three justices dissented).

2. TEX. TAX CODE ANN. § 151.312 (Vernon 1982) (amended 1989). See *infra* note 35 and accompanying text.

3. 731 S.W.2d 160 (Tex. App.—Austin 1987, writ ref'd n.r.e.), *rev'd*, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989).

4. 109 S. Ct. at 900-01, 103 L. Ed. 2d at 14.

5. 766 S.W.2d 593 (Tex. App.—Austin 1989, no writ).

6. Interesting sales tax cases are pending, although many pending cases are likely to be resolved without a reported opinion.

7. 766 S.W.2d at 600. See TEX. TAX CODE ANN. § 151.007 (Vernon 1982 & Supp. 1990).

8. 766 S.W.2d at 596.

tomers, it was required to pay tax.<sup>9</sup> The decision is interesting not only because of its substantive analysis of the transportation issue, but also because of its conclusion that "[a]dministration convenience may be a justifiable basis for a difference in treatment between different taxpayers."<sup>10</sup>

*Goldberg v. Sweet*,<sup>11</sup> which focused on the constitutionality of an Illinois sales tax on telecommunications, revisited the *Complete Auto Transit, Inc. v. Brady*<sup>12</sup> four-prong test for determining constitutionality of state taxes.<sup>13</sup> *Goldberg* may provide some guidance for Texas in determining proper apportionment rules for taxing services, such as data processing, that are not always clearly situated in a single state. Two other pending Supreme Court cases, which concern the circumstances in which a state may refuse to refund taxes paid pursuant to a statute that is subsequently declared unconstitutional, should provide guidance to Texas courts with respect to both sales and other state taxes.<sup>14</sup>

As in past years, far too many comptroller's administrative hearings were issued to be covered in a survey article. Many of these decisions addressed recurring sales tax issues, and although some reflect changes in comptroller's policy or clarifications of existing policy, many others evidence that varying fact patterns and analyses leave many long-standing issues only partially resolved. The prior contract exemption gave rise to several decisions. Decision 24,604,<sup>15</sup> for example, concerned an indefinite term contract subject to termination by either party on ninety days written notice. The administrative law judge held that the contract was not eligible for prior contract relief because the termination provision, as well as the provision that allowed the seller to increase the monthly charges on ninety days notice, protected the parties from the burden of a tax law change.<sup>16</sup> Although this ruling is consistent with the comptroller's requirement that a contract must have a definite ending date,<sup>17</sup> the requirement may not always be consistently applied.<sup>18</sup> Another administrative decision confirmed the comptroller's pol-

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9. *Id.* at 600.

10. *Id.* at 599 (citing *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 513 (1937)).

11. 109 S. Ct. 582, 102 L. Ed. 2d. 607 (1989).

12. 430 U.S. 274 (1977) (determining whether a tax violates the interstate commerce clause).

13. 109 S. Ct. at 587, 102 L. Ed. 2d at 614-15.

14. *McKesson Corp. v. Florida*, No. 88-192 (U.S.) (second oral argument Dec. 6, 1989); *American Trucking Ass'n, Inc. v. Smith*, No. 88-325 (U.S.) (second oral argument Dec. 6, 1989). The refund issue will likely arise, for example, with respect to payments made under Texas' administrative services tax, TEX. INS. CODE ANN. art. 4.11A (Vernon Supp. 1990), which has been declared unconstitutional as it applies to certain benefit plans. See, e.g., *Birdsong v. Olson*, 708 F. Supp. 792, 797-801 (W.D. Tex. 1989). *California State Bd. of Equalization v. Sierra Summit, Inc.*, 109 S. Ct. 2228, 2232-33, 104 L. Ed. 2d 910, 917-18 (1989), in which the court held that sales taxes may be imposed against a bankruptcy trustee, may also impact Texas sales tax issues.

15. Comptroller Hearing No. 24,604 (Sept. 25, 1989).

16. *Id.*

17. See 34 TEX. ADMIN. CODE § 3.319(c)(3) (eff. Mar. 18, 1989, 13 Tex. Reg. 1340).

18. Because the expiration dates of the grandfather provisions enacted by the 1987 Legislature, see *infra* notes 64-66 and accompanying text, preclude indefinite reliance on the grandfathering provisions, the potential for abuse may not be serious enough to merit the harsh results that this requirement may effect with respect to long-standing contracts.

icy that renewing or increasing contract prices will cause the contract to lose its prior contract exemption.<sup>19</sup>

Several administrative decisions addressed the scope of the telecommunications tax, as the comptroller strives to establish definitions in an extremely complex area.<sup>20</sup> Despite several decisions concerning the circumstances under which sales tax is accelerated on the assignment or factoring of a lease stream, there are still no clear-cut criteria for determining what constitutes an assignment for these purposes.<sup>21</sup>

Other decisions focused on the exemption from tax for occasional sales,<sup>22</sup> on the circumstances under which taxpayers may claim relief because of detrimental advice given by the comptroller's office,<sup>23</sup> and on successor liability.<sup>24</sup> Many of the most significant issues concerning taxable services remain

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19. Comptroller Hearing No. 24,435 (Sept. 18, 1989); *accord*, Comptroller Hearing No. 20,678 (Mar. 22, 1989). These decisions are not consistent with oral advice given by representatives of the comptroller's office who have indicated that the increased portion of the charges or the additional time added to the contract would not be exempt under the grandfather provisions, but that to the extent amounts paid under the contract do not exceed the original contract cost or term, those amounts would continue to be grandfathered. In part because the comptroller's office has issued letters to taxpayers on this issue (as well as with respect to others) during the survey year, it is difficult to determine how consistent the comptroller's representatives have been in their analysis of this issue.

20. *See, e.g.*, Comptroller Hearing Nos. 24,610 (Sept. 18, 1989) (answering services are taxable telecommunications services); 23,449 (Mar. 17, 1989) (rentals of radio tower repeaters taxable); and 23,320 (Mar. 30, 1989) (electronic mailbox services taxable).

21. *See, e.g.*, Comptroller Hearing Nos. 21,992 (Aug. 25, 1989) (taxpayer's assignments were more in nature of collateral for loans or part of agency for assignee; no acceleration; however, taxpayer remained liable for tax); 21,106 (Aug. 23, 1989) (taxpayer no longer liable to assignee after lease assignment if lessee defaults; therefore not a loan and consequently tax was accelerated); 23,351 (Apr. 27, 1989) (leases transferred without recourse, tax was accelerated); 22,995 (May 10, 1989) (no evidence of loan, tax was accelerated). *See* 34 TEX. ADMIN. CODE § 3.294 (eff. Dec. 5, 1984, 9 Tex. Reg. 6108).

22. *See, e.g.*, Comptroller Hearing Nos. 24,824 (Oct. 11, 1989) (concluding in part that a manufacturer was in the business of selling and therefore could not rely on the two-sale exception in TEX. TAX CODE ANN. § 151.304(b) (Vernon Supp. 1990)); 24,642 (May 15, 1989) (taxpayer sold marina in 1984, but retained boat which was sold several years later; subsequent boat sale did not qualify as the sale of a separate division, branch, or identifiable segment of a business or as one of only two sales during a 12-month period by persons not engaging in the business of selling; fact that seller was not a dealer in boats may affect seller's ability to issue resale certificate, but does not allow qualification for occasional sale); 24,577 (Apr. 6, 1989) (taxpayer's sale was not of all or substantially all property used in an activity with no substantial change in ownership; taxpayer failed to provide adequate proof of the value of property before transfer or of property transferred, or adequate information on the activity). Unfortunately, this decision offers no criteria for determining what constitutes an activity); 24,909 (July 25, 1989) (a sale may not qualify as an occasional sale of business unless it is a sale of an ongoing concern).

23. *See, e.g.*, Comptroller Hearing No. 23,415 (July 20, 1989) (prior audit may be the basis of a detrimental reliance when the audit issue is one that "a reasonably prudent auditor would seize upon in an ongoing audit"). Comptroller Hearing Nos. 24,559 and 24,560 (June 22, 1989) are unusual because they allow detrimental reliance based on oral advice from comptroller representatives.

24. *See, e.g.*, Comptroller Hearing No. 24,563 (Aug. 21, 1989) (successor liability under TEX. TAX CODE ANN. § 111.020 (Vernon Supp. 1990) did not apply to foreclosure sales on facts presented); *see also* Comptroller Hearing No. 22,978 (Aug. 15, 1989) (on rehearing, purchaser at foreclosure was not liable as successor); Comptroller Hearing No. 24,427 (May 17, 1989) (officer of defunct corporation personally liable for sales tax).

unanswered because few decisions focused on taxable services.<sup>25</sup>

### B. Legislative Developments

The 1989 legislative modifications of Texas sales tax were far less extensive than those made in 1987,<sup>26</sup> but several are noteworthy. The definition of "use" and "storage" for sales tax purposes now specifically excludes retaining tangible personal property to transport it outside of Texas for use solely outside of Texas and processing, fabricating or manufacturing the property into other property as well as incorporating it into other property to be transported outside of Texas.<sup>27</sup> The legislature also expanded the sales tax exclusion for certain employee-provided services to include some services by temporary employees,<sup>28</sup> and expanded the exemptions from taxable services to include repair, maintenance, creation, development, modification, and restoration of a computer program not sold by the person performing the service.<sup>29</sup> This legislative session also modified Section 151.328 of the Tax Code<sup>30</sup> to confirm an existing regulatory exemption<sup>31</sup> from sales tax for tangible personal property permanently affixed or attached as a component part of certain aircraft<sup>32</sup> and expanded the statutory exemption to cover equipment and services used by a certified or licensed air carrier in the repair, maintenance, and servicing of aircraft, aircraft engines or parts.<sup>33</sup> The legislature also provided for tax-free purchases of certain tangible personal property exported by maquiladora enterprises,<sup>34</sup> and modified the sales tax exemption for certain periodicals.<sup>35</sup>

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25. See Comptroller Hearing No. 24,641 (Oct. 26, 1989) (real property services); see also Comptroller Hearing No. 24,478 (Feb. 23, 1989) (remodeling); Op. Tex. Att'y Gen. No. JM-1016 (1989) (scope of insurance services). There is still little guidance available with respect to the services taxes. Other, older sales tax issues continue to form the basis for administrative controversies. For example, the 60-day rule on resale certificates, TEX. TAX CODE ANN. § 151.054(e) (Vernon Supp. 1990), continues to be troublesome. See, e.g., Comptroller Hearing Nos. 23,437 (Feb. 1, 1989); 23,181 (Jan. 5, 1989). Court decisions during the coming survey period are likely to address the 60-day rule. Several decisions discussed rules with respect to lump-sum contracts; see, e.g., Comptroller Hearing No. 24,361 (Apr. 4, 1989) (reality versus personalty), and sampling procedures; see, e.g., Comptroller Hearing Nos. 23,272 (Dec. 12, 1988) and 22,799 (Mar. 27, 1989).

26. See Ohlenforst & Dorrill, *Annual Survey of Texas Law: Taxation*, 42 Sw. L.J. 633, 636-44 (1988) for a description of 1987 sales tax legislation.

27. TEX. TAX CODE ANN. § 151.011 (Vernon Supp. 1990).

28. *Id.* § 151.057.

29. *Id.* § 151.0101.

30. *Id.* § 151.328.

31. 34 TEX. ADMIN. CODE § 3.297(c)(5) (eff. Oct. 30, 1984, 9 Tex. Reg. 5387) (this rule has been amended to conform with the legislative change; see *infra* note 53 and accompanying text).

32. TEX. TAX CODE ANN. § 151.328(e) (Vernon Supp. 1990).

33. *Id.* § 151.328(b), (d).

34. *Id.* § 151.156. A maquiladora enterprise is defined as a business entity chartered by the Mexican government and authorized by Mexico to make duty-free imports of certain property into Mexico for use in manufacturing, processing, or assembly of items for export. *Id.* § 151.156(f); see also 34 TEX. ADMIN. CODE § 3.358 (eff. Nov. 13, 1989, 14 Tex. Reg. 5735) (new administrative rule).

35. TEX. TAX CODE ANN. § 151.312 (Vernon Supp. 1990), as amended, now provides an exemption for periodicals and writings published or distributed by a "religious, philanthropic,

Some provisions were contingent on other changes in the law. Sections 151.059 and 151.107(c) of the Tax Code, for example, which provide a mechanism for certain nonresidents to pay a fee to the comptroller in lieu of local sales and use taxes<sup>36</sup> and impose a collection obligation on certain nonresidents,<sup>37</sup> are contingent on federal legislation authorizing state and local taxation of nonresidents who would not otherwise be taxable.<sup>38</sup>

Amended Section 151.429 of the Tax Code<sup>39</sup> allows a refund of certain sales taxes paid in connection with development in an enterprise zone for items purchased during the ninety days preceding designation as an enterprise project.<sup>40</sup> The statutory sales tax credit for certain purchases of machinery and equipment used in and necessary or essential to manufacturing, processing or repair of tangible personal property for sale<sup>41</sup> was revised, *inter alia*, to change the timing of the credit phase-in,<sup>42</sup> to place a cap on amounts to be refunded before August 31, 1991,<sup>43</sup> to provide that no interest is payable or refunded pursuant to this provision,<sup>44</sup> and to extend the credit provisions to certain equipment used in jet turbine aircraft engine overhauling, retrofitting, or repairing.<sup>45</sup>

The legislature made several other changes affecting the sales tax. The legislature amended the sales tax provisions relating to nontaxable food sales,<sup>46</sup> exempted certain coin and precious metal sales from tax,<sup>47</sup> expanded the exemptions for certain lawn and yard services,<sup>48</sup> and modified the ex-

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charitable, historical, scientific," or other similar non profit organization rather than only religious periodicals. The comptroller has not yet amended the applicable regulation. See 32 TEX. ADMIN. CODE § 3.299 (eff. Nov. 5, 1987, 12 Tex. Reg. 3924). The United States Supreme Court recently held unconstitutional the prior Texas sales tax exemption for religious periodicals. See *infra* note 1 and accompanying text. See also TEX. TAX. CODE ANN. § 151.320 (Vernon Supp. 1990) (magazine exemption).

36. TEX. TAX CODE ANN. § 151.059 (Vernon Supp. 1990).

37. *Id.* § 151.107(c). This provision provides a mechanism for imposing sales tax on out-of-state mail-order sellers if federal law authorizes state tax on such sales.

38. Statutory changes to the property tax freeport exemption were contingent on a subsequently passed constitutional amendment. See *infra* notes 204-210 and accompanying text.

39. TEX. TAX CODE ANN. § 151.429 (Vernon Supp. 1990).

40. *Id.* Section 151.429, like several others passed by the legislature this year, was enacted in substantially the same form by two separate bills; see Act of June 14, 1989, ch. 471, § 5, 1989 Tex. Sess. Law Serv. 1644 (Vernon) and Act of June 16, 1989, ch. 1106, §§ 21, 22, 1989 Tex. Sess. Law Serv. 4590 (Vernon). See also TEX. TAX CODE ANN. § 151.431 (Vernon Supp. 1990) (authorizing refunds of certain sales and use taxes paid by an enterprise zone qualified business that maintains a certain level of jobs retention). These provisions are among several enacted during the legislative session designed to offer tax incentives for business development in Texas.

41. TEX. TAX CODE ANN. § 151.318 (Vernon Supp. 1990); see generally Comptroller Hearing Nos. 23,434 (Feb. 13, 1989) (necessary and essential requirement); 23, 558 (Mar. 3, 1989) (six-month useful life requirement of 34 TEX. ADMIN. CODE § 3.300(c)(2)).

42. TEX. TAX CODE ANN. § 151.318(h) (Vernon Supp. 1990).

43. *Id.* § 151.318(j). Total refunds pursuant to this provision may not exceed \$57 million before Aug. 31, 1991 unless the comptroller determines that sufficient funds are available.

44. *Id.* § 151.318(k).

45. *Id.* § 151.318(n).

46. *Id.* § 151.314(c)(3) (now exempts certain foods ready for immediate consumption).

47. *Id.* § 151.336.

48. *Id.* § 151.347 (now allows an exemption not only for certain individuals younger than 18, but also for certain individuals over 64).

emption for certain joint ventures.<sup>49</sup>

### C. Regulatory Developments

As in past years, the comptroller issued new regulations and made significant revisions to others. Several revisions were necessary to make regulations consistent with new legislation.<sup>50</sup> For example, the legislature's reinstatement of the exclusion from sales tax for taxable items held for shipment outside of Texas or processed, manufactured, or attached to other property and shipped outside Texas<sup>51</sup> required amending the comptroller's rule concerning direct payment procedures to acknowledge this exemption.<sup>52</sup> Similarly, the legislature's exemption from sales tax for items used in the repair, remodeling, or maintenance of aircraft, engines, or components<sup>53</sup> necessitated revisions of the comptroller's rule concerning carriers.<sup>54</sup> The comptroller also amended a number of rules to take into account the special purpose districts that may be created by local option.<sup>55</sup>

Other rules addressed comptroller policy changes and clarifications. The comptroller's rule on repairing tangible personal property,<sup>56</sup> for example, was modified to reflect a policy change in the comptroller's office that resulted in treating certain car repairs as repairs rather than as sales of property and to reflect other modifications of the rule with respect to real property repair and remodeling.<sup>57</sup> The comptroller's rule on amusement services<sup>58</sup> now excludes from sales tax cover charges included in the admission price of amusements when the receipts are also taxed by the Alcoholic

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49. *Id.* § 151.348.

50. *See, e.g.*, 34 TEX. ADMIN. CODE § 3.286 (eff. Nov. 13, 1989, 14 Tex. Reg. 5786) (seller's and purchaser's responsibilities revised to include authorization for issuing maquiladora exemption certificates).

51. *See* TEX. TAX CODE ANN. § 151.011 (Vernon Supp. 1990); *supra* note 27 and accompanying text.

52. 34 TEX. ADMIN. CODE § 3.288 (amendment proposed Aug. 21, 1989, 14 Tex. Reg. 4288).

53. TEX. TAX CODE ANN. § 151.328 (Vernon Supp. 1990).

54. 34 TEX. ADMIN. CODE § 3.297 (adopted on an emergency basis Oct. 16, 1989). The revisions make clear that property is considered permanently affixed to aircraft, for purposes of qualifying for the exemption, notwithstanding the fact that the property may be detached from the aircraft for servicing or other purposes, and also confirm that certain attached accessories, such as air cargo containers, are exempt.

55. *See, e.g.*, 34 TEX. ADMIN. CODE § 3.343 (eff. Nov. 13, 1989; 14 Tex. Reg. 5787) (credit reporting services); *id.* § 3.344 (proposed Sept. 25, 1989; 14 Tex. Reg. 4294) (telecommunications services) (the proposed amendments to this rule also add FAX services to the list of taxable services). In addition, the Comptroller proposed, but later withdrew from consideration, a similar amendment to § 3.307 (florists). *See* 14 Tex. Reg. 4291 (proposed amendment) and 14 Tex. Reg. 6073 (proposed amendment withdrawn).

56. 34 TEX. ADMIN. CODE § 3.292 (adopted on an emergency basis Nov. 14, 1988, 14 Tex. Reg. 5808). As of the end of the survey period, this rule had apparently not been renewed in emergency form or issued in final form. However, it is not uncommon to have time lapse between the expiration and the reenactment of an emergency rule.

57. *Id.* The comptroller also adopted a new rule with respect to television stations, motion picture theater operators, and distributors. *See* 34 TEX. ADMIN. CODE § 3.350 (eff. Nov. 15, 1988, 13 Tex. Reg. 5580).

58. 34 TEX. ADMIN. CODE § 3.298 (eff. Nov. 13, 1989, 14 Tex. Reg. 5735).

Beverage Commission,<sup>59</sup> exempts sales in certain designated historic places,<sup>60</sup> and provides for local option special taxing districts.<sup>61</sup> In his revisions to Rule 3.324,<sup>62</sup> the comptroller made both substantive and form changes concerning several oil and gas issues.

The exemption for certain sales of services pursuant to a prior contract expired at the end of 1989,<sup>63</sup> and the exemption from the 1987 rate increase for certain sales pursuant to a prior contract expires July 1, 1990.<sup>64</sup> Several issues remain, however, concerning the comptroller's application of these exemptions. The comptroller resolved one controversial issue by amending the applicable rule<sup>65</sup> to delete the exclusion from exemption for contracts for goods or services "as needed."<sup>66</sup>

Although the comptroller has amended numerous rules this year, he has not completed rulemaking in connection with the new legislation. It is therefore likely, especially in view of the legislature's recent grant to the comptroller of expanded latitude in rulemaking,<sup>67</sup> that additional regulatory changes will be forthcoming soon.

## II. FRANCHISE TAX

### A. Calculation of Taxable Capital

The comptroller in Decision 23,001<sup>68</sup> ruled that a corporation that wanted to show an increased value for its assets in order to have a positive net worth (and thereby meet certain conditions for becoming a member of a profes-

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59. *Id.* § 3.298(a)(1)(F)(i), (e)(5) (referring to TEX. ALCO. BEV. CODE ANN. § 202.02 (Vernon 1978 & Supp. 1990)). See also Comptroller Hearing No. 23,535 (Feb. 1, 1989) (sales tax and fees to Alcoholic Beverage Commission both payable).

60. 34 TEX. ADMIN. CODE § 3.298(g)(1)(F)-(G).

61. *Id.* § 3.298(j).

62. 34 TEX. ADMIN. CODE § 3.324 (eff. Nov. 15, 1988, 13 Tex. Reg. 5580).

63. See Act of July 21, 1987, ch. 16, 1987 TEX. GEN. LAWS 43.

64. See Act of July 21, 1987, ch. 4, 1987 TEX. GEN. LAWS 20.

65. 34 TEX. ADMIN. CODE § 3.319 (eff. Aug. 24, 1989, 14 Tex. Reg. 4451).

66. *Id.* See also Comptroller Hearing 23,248 (Feb. 15, 1989) (requirements contract did satisfy TEX. TAX CODE ANN. § 151.339 (Vernon Supp. 1990) (exemption for prior contracts, and comptroller's rule to the contrary was invalid).

67. See TEX. TAX CODE ANN. § 111.002 (Vernon Supp. 1990) which specifically authorizes the comptroller to adopt rules to reflect changes in the state's power to collect taxes due to changes in the Texas or United States Constitution, laws, or judicial interpretations thereof. See also *id.* § 101.002 (providing that Texas' jurisdiction and authority to "determine the subjects and objects of taxation shall extend to the limits of the then-current interpretations" of the Texas and United States Constitutions and laws). This provision, which may well be subject to constitutional challenge, makes it more difficult to give opinions on state tax issues, especially with respect to issues for which rules have not yet been issued. Although the comptroller's office generally issues new regulations promptly following legislation, revisions are not always available to interpret new legislation and judicial decisions. Amendments to 34 TEX. ADMIN. CODE § 3.300, for example, are still in draft form. Amendments to this rule are necessary to reflect changes made to the phase-in of the exemption for certain manufacturing machinery and equipment. See *id.* An emergency amendment to this rule was recently adopted to establish the eligibility for exemption of certain gases used in manufacturing. See 14 Tex. Reg. 3175. In its current form, the rule does not allow exemptions with respect to taxable items rented or leased to a person engaged in manufacturing.

68. Comptroller Hearing No. 23,001 (Mar. 31, 1989).



sional association) was not required to include in its calculation of surplus for franchise tax purposes an account on its books labelled "reappraisal surplus" that was assigned an arbitrary value.<sup>69</sup> Although the definition of surplus includes all "surplus accounts carried on the books and records, such as . . . appraisal capital from appreciation of assets . . .,"<sup>70</sup> the comptroller may look only to assets which are available for use by the taxpayer.<sup>71</sup> The comptroller ruled that this new account did not represent assets available to be used by the corporation.<sup>72</sup>

As in past survey periods, the comptroller issued numerous decisions that addressed whether a purported loan to a corporation by a related entity was, in fact, a capital contribution and therefore part of the recipient's taxable capital. Two of these decisions are noteworthy. In Decision 21,908<sup>73</sup> the comptroller treated advances by the taxpayer's shareholder as capital contributions. The administrative law judge analyzed seven factors: (1) whether the advance was evidenced by a legally enforceable debt instrument; (2) whether other property was encumbered as collateral; (3) whether the recipient recorded the advances on its books as a liability; (4) whether repayments had been made regularly; (5) whether a reasonable rate of interest was charged; (6) whether the lender enforced and/or attempted to enforce payment; and (7) whether the recipient had both a cash flow and a debt to equity ratio such that it could have acquired a similar loan from an unrelated lender.<sup>74</sup> The comptroller focused on the last factor.<sup>75</sup> Because the taxpayer had used up its bank credit and had pledged all its property to the bank, it would not have been able to acquire similar loans from third parties.<sup>76</sup>

The comptroller in Decisions 23,033 and 23,035 ruled that purported advances by a related entity to the taxpayer were in fact loans.<sup>77</sup> Pursuant to a cash management system, the related entity paid all of the taxpayer's account payables. Although no formal debt instruments were executed and no collateral was secured, interest was charged, the advances were treated as loans in the parties' books, regular payments were made, and the lender enforced the repayment obligations.<sup>78</sup> The comptroller made no finding with respect to whether the taxpayer could attain a similar loan from a third party.<sup>79</sup>

In Decisions 22,720 and 23,132<sup>80</sup> the comptroller ruled that two corpora-

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69. *Id.*

70. 34 TEX. ADMIN. CODE § 3.405(a) (amended January 1, 1988, 13 Tex. Reg. 164).

71. *State v. Shell Oil Co.*, 747 S.W.2d 54, 56-57 (Tex. App.—Austin 1988, writ ref'd n.r.e.).

72. Comptroller Hearing No. 23,001 (Mar. 31, 1989).

73. Comptroller Hearing No. 21,908 (Jan. 19, 1989).

74. *Id.*

75. *Id.*

76. *Id.*

77. Comptroller Hearing Nos. 23,033 and 23,035 (Nov. 17, 1988).

78. *Id.* The comptroller applied the same criteria used in Decision 21,908. *See supra* notes 73-76 and accompanying text.

79. Comptroller Hearing Nos. 23,033 and 23,035 (Nov. 17, 1988).

80. Comptroller Hearing Nos. 22,720 and 23,132 (May 9, 1989).

tions that became sister subsidiaries pursuant to a nontaxable acquisition by the parent corporation were required to determine their taxable capital by utilizing the "push-down"<sup>81</sup> accounting method because they utilized such method of accounting for financial reporting purposes despite the fact that they used the historical cost method for federal income tax purposes.<sup>82</sup> The taxpayers asserted that requiring them to value their assets pursuant to the push-down accounting method is unconstitutional because it could result in similarly-situated taxpayers being taxed differently, *i.e.*, a corporation that did not use push-down accounting for its financial statements would pay less tax than the taxpayer after a similar acquisition.<sup>83</sup> The comptroller ruled, however, that they had not shown that they paid more taxes compared to another equally situated taxpayer.<sup>84</sup>

### B. Allocation of Capital

The comptroller ruled in Decision 21,879<sup>85</sup> that payments by a taxpayer's subsidiary to the taxpayer's creditors were dividends and were therefore treated as non-Texas receipts under the location-of-the-payor rule<sup>86</sup> rather than a management fee (which would have resulted in the receipts being treated as Texas receipts<sup>87</sup>) to the taxpayer even though the taxpayer classified such payments as management fees in its books and records and treated the receipts as Texas receipts on its franchise tax return.<sup>88</sup> During the years in question the taxpayer provided no management services; in fact, it had no employees. Although the taxpayer's books and records classified the payment as a fee, the comptroller relied on the rule governing adjustments and changes to books and records which provides that changes after the fact in a corporation's books and records will not be accepted for the purpose of recalculating franchise tax liability for prior years unless the change corrects an error.<sup>89</sup> The comptroller also denied the Tax Division's argument that an informal declaration of dividend cannot be recognized for franchise tax purposes.<sup>90</sup>

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81. Pursuant to the push-down accounting method, the value of a subsidiary's assets equals the fair market value of such assets as determined by allocating to such assets the consideration paid for the corporation (or parent corporation) by the new owner. See Comptroller Hearing No. 20,278 (May 16, 1978) (discussion of push-down accounting); see also 34 TEX. ADMIN. CODE § 3.405.

82. Comptroller Hearing Nos. 22,720 and 23,132 (May 9, 1989). Pursuant to the historical cost method, the assets of an acquired corporation (or its subsidiaries) are not revalued after the purchase, but remain at their historical cost.

83. The taxpayers relied on *Bullock v. Sage Energy Co.*, 728 S.W.2d 465, 468 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

84. Comptroller Hearing Nos. 22,720 and 23,132 (May 9, 1989). The comptroller relied on *Southern Clay Products, Inc. v. Bullock*, 753 S.W.2d 781, 784 (Tex. App.—Austin 1988, no writ); see also Ohlenforst & Dorrill, *Annual Survey of Texas Law: Taxation*, 43 Sw. L.J. 579, 592-93 (1989).

85. Comptroller Hearing No. 21,879 (Sept. 29, 1988).

86. See 34 TEX. ADMIN. CODE § 3.403(e)(5)(A).

87. See *id.* § 3.403(d)(14).

88. Comptroller Hearing No. 21,879 (Sept. 29, 1988).

89. *Id.*; see 34 TEX. ADMIN. CODE § 3.391(b)(5).

90. Comptroller Hearing No. 21,879 (Sept. 29, 1988).

In Decisions 21,122 and 22,234<sup>91</sup> the comptroller ruled that a taxpayer's receipts from the sale of accounts receivable generated from credit sales of tangible personal property in Texas should be treated as Texas receipts.<sup>92</sup> The taxpayer asserted that the allocation of the receipts from the sale of these accounts receivable should be controlled by the rule governing the sales of intangibles,<sup>93</sup> but the comptroller concluded that the sale of the intangibles was associated with the underlying sale of tangible personal property to the customer and should be governed by Section 171.103(1) of the Tax Code<sup>94</sup> which concerns the allocation of receipts from tangible personal property.<sup>95</sup>

In Decision 22,902<sup>96</sup> the comptroller addressed the allocation of receipts from licenses for computer programs. The taxpayer entered an agreement that granted IBM a non-exclusive right to license certain computer programs developed by the taxpayer to IBM's sub-licensees. The programs were not developed specifically for IBM. IBM agreed to pay the taxpayer a fee each time a program was sub-licensed. The comptroller ruled that the fees paid to the taxpayer were royalties.<sup>97</sup> Pursuant to a comptroller's rule,<sup>98</sup> royalties are allocated according to the location at which the licensed material is used. Because IBM's sub-licensees were located both in and out of Texas, the taxpayer was required to show the location of each sub-licensee not located in Texas.<sup>99</sup> Otherwise, royalties with respect to a sub-licensee are to be allocated to Texas.<sup>100</sup>

In Decision 22,645<sup>101</sup> the comptroller interpreted the throw-back rule, which provides that gross receipts from business done in Texas include receipts from sales of tangible personal property shipped from Texas to a purchaser in another state in which the seller is not subject to taxation.<sup>102</sup> The taxpayer submitted to the comptroller affidavits and copies of expense reimbursement requests from other states to attempt to prove that it had a sufficient nexus with these other states in order for such states to tax the taxpayer, and had set up a reserve account for payment of taxes in these other states.<sup>103</sup> The comptroller found that the taxpayer's evidence had set

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91. Comptroller Hearing Nos. 21,122 and 22,234 (Jan. 5, 1989).

92. *Id.*

93. *See* 34 TEX. ADMIN. CODE § 3.403(e).

94. TEX. TAX CODE ANN. § 171.103(1) (Vernon Supp. 1990).

95. Comptroller Hearing Nos. 21,122 and 22,234 (Jan. 5, 1989). This decision also concluded that taxpayer's surplus was reduced by an unfunded actuarial liability of its pension plan because the liability was contractual. *Id.*

96. Comptroller Hearing No. 22,902 (Dec. 28, 1988).

97. *Id.*

98. 34 TEX. ADMIN. CODE § 3.403(e)(11).

99. Comptroller Hearing No. 22,902 (December 28, 1988).

100. *Id.*

101. Comptroller Hearing No. 22,645 (Nov. 1, 1988).

102. TEX. TAX CODE ANN. § 171.103(1) (Vernon Supp. 1990). *See also* 34 TEX. ADMIN. CODE § 3.403 (1988).

103. The fact that the taxpayer did not actually pay taxes in these other states does not determine whether the taxpayer is subject to tax in such states for this purpose because Texas law is generally employed to determine whether a taxpayer is subject to tax in another state for purposes of the throw-back rule. 34 TEX. ADMIN. CODE § 3.403.

out a prima facie case, but that the taxpayer did not meet its burden of showing itself subject to tax in other states.<sup>104</sup>

In Decision 23,607<sup>105</sup> the comptroller ruled that litigation settlement proceeds received during the taxpayer's 1985 fiscal year, which would be treated as non-Texas gross receipts under a 1987 comptroller's rule,<sup>106</sup> would not be considered in determining the taxpayer's 1986 franchise taxes. The comptroller stated that the comptroller's rule could be applied only prospectively given that the rule did not contain a retroactive provision.<sup>107</sup>

### C. Liability for Tax—Doing Business in Texas

In Decision 24,691<sup>108</sup> the comptroller ruled that a Nevada corporation that had no employees, no Texas address or telephone number, no physical premises, no assets other than stock of its subsidiary and a nominal amount of cash, and no operations other than the election of officers and directors and the receipt and payment of dividends was doing business in Texas for franchise tax purposes.<sup>109</sup> The corporation's ties to Texas consisted of maintaining a bank account in Texas that was used for receiving and paying dividends, and having accounting entries performed by employees of related corporations located in Texas. The comptroller concluded that the taxpayer had continuing and systematic contacts with Texas.<sup>110</sup>

### D. Legislative and Regulatory Developments

The legislature repealed, effective for periods beginning on or after May 1, 1989,<sup>111</sup> the Texas Tax Code provision that authorized the comptroller to allow a taxpayer to use an alternative formula to allocate its capital to Texas for franchise tax purposes instead of the gross receipts allocation.<sup>112</sup> Given

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104. Comptroller Hearing No. 22,645 (Nov. 1, 1988).

105. Comptroller Hearing No. 23,607 (March 9, 1989).

106. 34 TEX. ADMIN. CODE § 3.403(e)(8) (enacted on an emergency basis on December 30, 1987, proposed as a new rule on March 23, 1988, adopted June 28, 1988, 13 Tex. Reg. 2971). This rule reads as follows:

Litigation Awards. All litigation awards are gross receipts, except those consisting of a recovery of compensatory damages for fire or other casualty losses on property, to the extent the recovery does not exceed the net book value of the property. Litigation awards are allocated to the commercial domicile of the recipient corporation.

*Id.*

107. Comptroller Hearing No. 23,607 (March 9, 1989). The comptroller relied on TEX. GOV'T CODE ANN. § 311.022 (Vernon 1988) and *Spindletop Oil & Gas Co. v. Parker County*, 738 S.W.2d 715, 721 (Tex. App.—Fort Worth 1987, writ denied), which set forth the criteria for retroactive application of statutes. This administrative decision may have special significance because of the vast number of new rules promulgated by the comptroller in the last three years, several of which contain changes in policy.

108. Comptroller Hearing No. 24,691 (Aug. 16, 1989).

109. *Id.*

110. *Id.*; see also Comptroller Hearing No. 20,625 (May 1, 1987).

111. See Act of Mar. 1, 1989, ch. 3, § 2, 1989 Tex. Sess. Law Serv. 200 (Vernon).

112. TEX. TAX CODE ANN. § 171.108 (Vernon 1982) (repealed 1989); see also 34 TEX. ADMIN. CODE § 3.393(e) (eff. Sept. 21, 1989, 14 Tex. Reg. 4600) (conforming amendment to applicable rule).

the long history of alternative formulas, the fact that many taxpayers relied on an alternative, and the constitutional requirement, among others, that state tax be fairly apportioned,<sup>113</sup> repeal of this statute is likely to give rise to litigation challenging the constitutionality of basing the tax on the gross-receipts formula.<sup>114</sup>

Changes were also made, *inter alia*, to franchise provisions concerning surplus,<sup>115</sup> gross receipts,<sup>116</sup> mergers,<sup>117</sup> and banking corporation reports.<sup>118</sup> The legislature enacted two versions of Section 171.113 of the Tax Code,<sup>119</sup> which allows certain close or S corporations to use the federal income tax method rather than requiring GAAP. New Section 171.501 allows a limited refund of franchise tax for certain corporations that create new jobs in an enterprise zone.<sup>120</sup>

The legislature also modified the nonprofit corporation franchise tax exemption,<sup>121</sup> added an exemption for recycling sludge,<sup>122</sup> and enacted a provision allowing an enterprise project to reduce its taxable capital.<sup>123</sup> The legislature did not extend the temporary rate increase enacted in 1987, so the

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113. See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

114. See TEX. TAX CODE ANN. § 171.106 (Vernon 1982). By the time this article was written, lawsuits had already been filed challenging this repeal. See, e.g., *General Motors Corp. v. Bullock*, No. 46, 405 (Dist. Ct. of Travis County filed June 12, 1989).

115. See TEX. TAX CODE ANN. § 171.109(g)-(h) (Vernon Supp. 1990). Subsection (g) requires an oil and gas company that reports surplus on the GAAP method to use the successful efforts or full cost method of accounting. See also 34 TEX. ADMIN. CODE § 3.405 (amendment proposed June 21, 1989, 14 Tex. Reg. 3191); 34 TEX. ADMIN. CODE § 3.415 (eff. Dec. 13, 1989, 14 Tex. Reg. 6292) (outlining acceptable oil and gas reserve estimating methods to be used in analyzing intangible drilling costs). Section 171.109(h) of the Tax Code provides that an investor may not exclude pre-acquisition retained earnings from the cost of the subsidiary in calculating surplus. § 171.109(h); see also 34 TEX. ADMIN. CODE § 3.391(b)(7) (eff. Sept. 21, 1989, 14 Tex. Reg. 4599). This revision reflects a change in policy.

116. TEX. TAX CODE ANN. § 171.112(e) (Vernon Supp. 1990). This section now provides that a corporation may not change its accounting methods used to calculate gross receipts more than once in 4 years without the comptroller's express consent. *Id.* Prior to revision, this restriction referred to changes in accounting method by corporations that report gross receipts according to GAAP. *Id.* § 171.116 (commentary).

117. See *id.* § 171.1531(b) (Vernon Supp. 1990) (providing that only surviving corporations that are subject to franchise tax are entitled to credit, and that credit is to be allocated among survivors based on taxable capital).

118. See *id.* § 171.2021 (Vernon Supp. 1990) (modifying reporting requirements to require report to cover deposits attributed as of close of last business day of year to accounts assigned by the banking corporation). The applicable rule, 34 TEX. ADMIN. CODE § 3.411 (eff. Nov. 9, 1987, 12 Tex. Reg. 3924) has not yet been amended.

119. See TEX. TAX CODE ANN. § 171.113 (Vernon Supp. 1990) as added by Act of June 15, 1989, ch. 801, § 82, 1989 Tex. Sess. Law Serv. 3663 (Vernon) and by Act of June 16, 1989, ch. 1198, § 5, 1989 Tex. Sess. Law Serv. 4890 (Vernon). See also 34 TEX. ADMIN. CODE § 3.391(b)(5), (d)(2) (eff. Sept. 21, 1989, 14 Tex. Reg. 4599).

120. TEX. TAX CODE ANN. § 171.501 (Vern. Supp. 1990); see *supra* note 39 and accompanying text.

121. TEX. TAX CODE ANN. § 171.063 (Vernon Supp. 1990); see 34 TEX. ADMIN. CODE § 3.399(e) (amendment proposed June 29, 1989, 14 Tex. Reg. 3342).

122. TEX. TAX CODE ANN. § 171.085 (Vernon Supp. 1990); see also 34 TEX. ADMIN. CODE § 3.399(h) (amendment proposed June 29, 1989, 14 Tex. Reg. 3342). [Don't you think every good law journal article should discuss recycling sludge?]

123. TEX. TAX CODE ANN. § 171.1015 (Vernon Supp. 1990) (sets forth provision and refers to Texas Enterprise Zone Act, TEX. REV. CIV. STAT. ANN. art. 5190.7 (Vernon Supp. 1990)).

franchise tax rate and minimum tax returned to pre-1988 levels as of January 1, 1990.<sup>124</sup>

Although most regulatory changes concerning franchise tax implement legislative changes, some regulation amendments reflect a change of policy by the comptroller. A proposed change to Rule 3.405,<sup>125</sup> for example, allowing a surplus deficit to be subtracted from stated capital, reflects a change of long-standing comptroller policy. Taxpayers with surplus deficits in excess of reported capital should consider filing claims for refund based on this rule. The comptroller also adopted a new franchise tax rule concerning title insurance holding companies.<sup>126</sup>

### III. PROPERTY TAX

#### A. *Use of Ad Valorem Taxes—Texas System of Public School Financing*

In *Edgewood Independent School District v. Kirby*<sup>127</sup> the Texas Supreme Court held that the Texas system of public school financing violates the efficiency mandate of article VII, section 1, of the Texas Constitution.<sup>128</sup> Article VII, section 1, provides that it is the duty of the Texas legislature to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools."<sup>129</sup> The court interpreted the term "efficient" to mean "effective or productive of results,"<sup>130</sup> and concluded that the purpose of the efficiency requirement was to provide a "general diffusion of knowledge."<sup>131</sup>

After determining that the present system of public school financing resulted in a dramatic disparity in spending per student between school districts, enabling property-rich districts to tax low and spend high and requiring property-poor districts to tax high and spend low,<sup>132</sup> the court held that the present system of public school funding is not efficient, does not provide for a general diffusion of knowledge, and is limited and unbalanced.<sup>133</sup> The court gave the Texas legislature until May 1, 1990, to imple-

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124. See TEX. TAX CODE ANN. § 171.002 (Vernon Supp. 1990).

125. 34 TEX. ADMIN. CODE § 3.405 (amendment proposed June 21, 1989, 14 Tex. Reg. 3190).

126. 34 TEX. ADMIN. CODE § 3.416 (eff. Jan. 23, 1990, 15 Tex. Reg. 117).

127. 777 S.W.2d 391 (Tex. 1989).

128. *Id.* at 397; see TEX. CONST. art. VII, § 1.

129. *Id.* The Austin Court of Appeals held that the interpretation of the efficiency mandate was a "political question not suitable for judicial review." *Kirby v. Edgewood Indep. School Dist.*, 761 S.W.2d 859, 867 (Tex. App.—Austin 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989).

130. 777 S.W.2d at 395. The state argued that the efficiency mandate merely required a simple and inexpensive system.

131. *Id.* at 394.

132. *Id.* at 392. The court noted that the wealthiest Texas school district has over \$14 million of property wealth per pupil, while the poorest school district has only \$20,000 of property wealth per student. *Id.* Because of the disparity in wealth, local rates ranged from \$.09 to \$1.55 per \$100 valuation in 1985 and 1986. *Id.* at 393.

133. *Id.* at 397. The court also responded to the state's argument that the 1883 constitutional amendment of article VII, section 3 of the Texas Constitution expressly authorized the present system. This amendment sanctioned the use of local taxes for public school financing.

ment a system of public school financing meeting the requirements set forth in the Texas Constitution,<sup>134</sup> but offered no specifics to the Texas legislature as to how to achieve an efficient system.<sup>135</sup>

In a property tax decision also having sales tax ramifications, the Eastland Court of Appeals in *Lingleville Independent School District v. Valero Transmission Co.*<sup>136</sup> held that a gas transmission pipeline buried below normal plow depth is personal property for ad valorem tax purposes.<sup>137</sup> A four-year limitation period applies to suits to collect tax on personal property, whereas a twenty-year statute of limitations applies to suits to collect tax on real property.<sup>138</sup> The suit by the school district was therefore barred by the four-year statute of limitations.<sup>139</sup>

The court looked at three factors in determining whether the pipe had become a fixture: (1) the mode and sufficiency of annexation; (2) the adaptation of the personalty to the purpose of the realty; (3) and the intent of the party who annexed the personalty to the realty,<sup>140</sup> with intent being the pre-eminent factor.<sup>141</sup> The court relied heavily on the contractual provisions in the easement between the taxpayer and the landowner, which provided that the taxpayer had the right to remove or replace the pipeline.<sup>142</sup>

### B. Application of Tax

The Texarkana Court of Appeals held in *First Bank of Deer Park v. Deer Park Independent School District*<sup>143</sup> that the 1983 United States Supreme Court decision of *American Bank and Trust Co. v. Dallas County*<sup>144</sup>, which held that the Texas ad valorem tax on bank shares under Section 11.02(b) of the Tax Code<sup>145</sup> was unconstitutional,<sup>146</sup> could not be applied retroactively under the three-prong test established by the United States Supreme Court for determining whether civil decisions by that court should be applied retroactively.<sup>147</sup> Under the first prong, for a prospective application the deci-

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TEX. CONST. art. VII, § 3. The court stated that this amendment merely served as a vehicle for injecting more money into a system that is required to be efficient. 777 S.W.2d at 396.

134. 777 S.W.2d at 399.

135. *Id.* at 397-99. The court noted that an efficient system must offer substantially equal access to similar revenues per student at similar levels, although the efficiency mandate does not require per capita distribution. *Id.* at 397.

136. 763 S.W.2d 616 (Tex. App.—Eastland 1989, writ denied).

137. *Id.* at 620.

138. TEX. TAX CODE ANN. § 33.05 (Vernon 1982).

139. 763 S.W.2d at 620.

140. *Id.* at 617-18.

141. *Id.*

142. *Id.* The court also ruled that the four-year limitation period for suits to collect taxes on personal property was constitutional. *Id.* at 620.

143. 770 S.W.2d 849 (Tex. App.—Texarkana 1989, no writ).

144. 463 U.S. 855 (1983). The property tax on bank shares was held to violate 31 U.S.C. § 742 (1982) because no deductions were made for tax-exempt United States obligations held by banks. *Id.* at 863.

145. TEX. TAX CODE ANN. § 11.02(b) (amended 1984). The 1989 amendment repealed the tax on stock in a banking corporation.

146. 463 U.S. at 863.

147. 770 S.W.2d at 851. See *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); see also *supra*

sion must establish a new principle of law.<sup>148</sup> Because the *American Bank and Trust Co.* case overruled past precedent, this test favored prospective application.<sup>149</sup> The second prong inquiry concerns whether retroactivity will further or retard the rule of law addressed in the particular case.<sup>150</sup> The court noted that the purpose of the federal statute limiting states' rights to tax federal obligations is to prevent taxes which diminish the market value of United States obligations.<sup>151</sup> Because retroactive application of the holding in *American Bank and Trust Co.* would not enhance the value of federal obligations, this prong favored prospective application.<sup>152</sup> Under the third prong, the court determined that retroactivity would produce substantial inequitable results by creating an unreasonable hardship on school districts that have already appropriated and spent the revenues generated from the unconstitutional tax.<sup>153</sup>

In *Tarrant Appraisal District v. Colonial Country Club*<sup>154</sup> the Fort Worth Court of Appeals held that the Greenbelt Act,<sup>155</sup> which allows for special appraisal of land according to its market value as recreational, scenic, or park land, is constitutional.<sup>156</sup> The Tarrant Appraisal District asserted that the Act (a) violates the requirement in the Texas Constitution that "taxation of real property shall be equal, uniform, and in proportion to value,"<sup>157</sup> and (b) provides for a partial exemption, which is unconstitutional.<sup>158</sup> The court determined, however, that the special appraisal provided in the Act is merely a method of assessing value and is not a tax exemption.<sup>159</sup> The court stated that the "equal and uniform" requirement is met when classifications of persons with property for taxation are not unreasonable or arbitrary.<sup>160</sup> The Greenbelt Act met this test because the classification of recreational land serves a legitimate state interest.<sup>161</sup> The court also held that use of the clubhouse for certain nonresidential activities did not invalidate the reasonable classification of the land because the clubhouse activities were merely incidental to the operation of the club's recreational activities<sup>162</sup> and the clubhouse was an improvement and, therefore, not eligible for special

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note 14 and accompanying text (pending Supreme Court cases concerning whether states must pay refunds of taxes paid under statutes subsequently declared unconstitutional).

148. 770 S.W.2d at 851.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* The court also held that the voluntary payment rule applied to the taxpayers. *Id.* at 853. See *infra* notes 228-231 for a discussion of the voluntary payment rule.

154. 767 S.W.2d 230 (Tex. App.—Fort Worth 1989, writ denied).

155. TEX. TAX CODE ANN. §§ 23.81-87 (Vernon 1982).

156. 767 S.W.2d at 237.

157. *Id.* at 233. See TEX. CONST. art. VIII, § 1.

158. Exemptions are constitutional only if specifically enumerated in the Texas constitution. TEX. CONST. art. VIII, §§ 1, 2.

159. 767 S.W.2d at 233.

160. *Id.* at 234.

161. *Id.*

162. *Id.* at 238.



appraisal.<sup>163</sup>

### C. Exemptions

In *Hood County Central Appraisal District v. Davies*<sup>164</sup> the Fort Worth Court of Appeals addressed whether an owner of a church camp was entitled to a property tax exemption under the religious organization exemption in Section 11.20 of the Tax Code.<sup>165</sup> The county first argued that the owner did not meet the statutory requirements for the exemption. The requirements in effect for the years in question were that (1) the organization must direct in its charter, bylaws, or other regulation that its assets must be transferred either to the state of Texas or to a charitable organization upon its discontinuance, and (2) the organization must be organized and operated primarily for engaging in religious worship.<sup>166</sup> Although the taxpayers presented no document stating that its assets would be transferred to the state or to a charitable organization upon its discontinuance, in holding that the taxpayer met this requirement, the court relied on the regulations of the national church of which the taxpayer was a subsidiary entity.<sup>167</sup>

The county also argued that taxpayer had not met the second requirement mentioned above because the camp was not owned by the taxpayer, but by a non-profit corporation owned by the taxpayer, and there was insufficient evidence that this corporation was organized for religious purposes.<sup>168</sup> The court held that the purpose stated in this corporation's charter—to use the assets deposited with it in accordance with the taxpayer's canons—was sufficient evidence that the taxpayer was the real owner of the property.<sup>169</sup> Finally, the court held that the "religious worship" exemption was not unconstitutionally broad, relying on cases addressing this precise issue.<sup>170</sup>

The San Antonio Court of Appeals in *Kerr Central Appraisal District v. Stacy*<sup>171</sup> held that land used for grazing horses qualified as open-space land under section 23.51 of the Tax Code,<sup>172</sup> even though the horses were used by a boys camp solely for recreational riding conducted off the property claimed as open-space land.<sup>173</sup> In order to qualify as open-space land, thereby entitling the land to special appraisal, the land must, in addition to

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163. *Id.*

164. *Hood County Central Appraisal District v. Davies*, — S.W.2d — (Tex. App.—Fort Worth 1989, —). See also *Dallas County Appraisal Dist. v. Institute for Aerobics Research*, 766 S.W.2d 318, 318 (Tex. App.—Dallas 1989, writ denied) (addressing exemption for biomedical research corporations).

165. TEX. TAX CODE ANN. § 11.20(a) (Vernon Supp. 1990) (exemption was expanded in 1987).

166. *Id.*

167. — S.W.2d at —.

168. *Id.* at —.

169. *Id.* at — (citing *Arnold v. Southern Pine Lumber Co.*, 58 Tex. Civ. App. 186, 123 S.W. 1162, 1168 (1909, writ dism'd)).

170. — S.W.2d at —. See *Earle v. Program Centers of Grace Union Presbytery, Inc.*, 670 S.W.2d 777, 780 (Tex. App.—Fort Worth 1984, no writ).

171. 775 S.W.2d 739 (Tex. App.—San Antonio 1989, writ denied).

172. TEX. TAX CODE ANN. § 23.51 (Vernon Supp. 1990).

173. 775 S.W.2d at 742. Open-space land is appraised for ad valorem tax purposes based

other conditions, be devoted principally to agricultural use to the degree of intensity generally accepted in the area.<sup>174</sup> Agricultural use includes the raising or keeping of livestock.<sup>175</sup> The appraisal district argued that some agricultural products must be produced in order for land to qualify for open-space land appraisal. The court ruled, however, that it is the use of the land that must be scrutinized; in the facts at hand, the land was not being used for recreational purposes.<sup>176</sup> Therefore, the court ruled that the land qualified as open-space land.<sup>177</sup>

The Attorney General ruled that an owner of land designated for agricultural use<sup>178</sup> under article VIII, section 1-d of the Texas Constitution<sup>179</sup> is not liable for the rollback taxes when the government condemns the land in an eminent domain proceeding.<sup>180</sup> Land qualifying as agricultural land is entitled to special appraisal according to its productive capacity rather than its fair market value.<sup>181</sup> If the use of agricultural land changes from a qualifying use or is sold, a rollback tax is imposed equal to the difference between taxes paid during the preceding three years and the taxes that would have been paid had the land not been classified for agricultural use.<sup>182</sup> The Attorney General interpreted the Texas Constitution to provide that an owner of agricultural land that is diverted to non-agricultural use or is sold is not personally liable for the Texas rollback tax; rather, a lien attaches to the property sold.<sup>183</sup>

#### D. Procedure

In *Texas National Bank of Baytown v. Harris County*<sup>184</sup> the voluntary payment rule again prevented a taxpayer from recovering ad valorem taxes.<sup>185</sup> Texas law provides that taxes voluntarily paid by a taxpayer may not be recovered, even if unlawfully collected, unless the taxes were paid because of fraud, express or implied duress, or mutual mistake of fact.<sup>186</sup>

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on its productive use value rather than its fair market value. TEX. TAX CODE ANN. § 23.52 (Vernon 1982).

174. TEX. TAX CODE ANN. § 23.51(1) (Vernon 1982).

175. *Id.* § 23.51(2).

176. 775 S.W.2d at 742.

177. *Id.* Presumably, the taxpayers would have lost this case if the horses were used significantly for recreational purposes on the land claimed as open-space land because the degree of intensity or the primary use standards would not have been met. See MANUAL FOR THE APPRAISAL OF AGRICULTURAL LAND (1988).

178. Land can be designated for agricultural use if it is devoted exclusively to or developed continuously for agriculture for three successive years, the owner of the land uses it in an occupation or a profit-motivated venture, and agriculture is the primary occupation and source of income for the owner of this land. TEX. TAX CODE ANN. § 23.42(a) (Vernon 1982).

179. TEX. CONST. art. VIII, § 1-d.

180. Op. Tex. Att'y Gen. No. JM-949 (1988).

181. TEX. TAX CODE ANN. § 23.41(a) (Vernon 1982).

182. *Id.* § 23.55.

183. Op. Tex. Att'y Gen. No. JM-949 (1988).

184. 765 S.W.2d 823 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

185. *Id.* at 826.

186. *Id.* at 825 (quoting *Salvaggio v. Houston Indep. School Dist.*, 709 S.W.2d 306, 308 (Tex. App.—Houston [14th Dist.] 1986, writ dismissed)).

The taxpayer asserted that he paid the taxes under implied duress in order to avoid penalties and interest and because the unpaid taxes would reflect poorly on its certified audit, which would affect its ability to procure a bond.<sup>187</sup> The court held that the taxes were not paid under implied duress because the taxpayer was not under a business compulsion to pay the taxes.<sup>188</sup> The business compulsion doctrine applies if the statute imposes an onerous burden for nonpayment that potentially deprives the taxpayer of the right to do business.<sup>189</sup> The court held that the consequences associated with the failure to pay taxes would not prevent the taxpayer from engaging in business.<sup>190</sup>

In *Vinson v. Burgess*<sup>191</sup> the Texas Supreme Court held that Section 26.07 of the Tax Code,<sup>192</sup> which authorizes property tax rollback elections for taxing units other than school districts, is not unconstitutional in its application to counties.<sup>193</sup> The statute permits voters of a taxing unit, other than a school district, that has adopted a tax rate exceeding the taxing unit's rollback rate to require that an election be held to determine whether to reduce the tax to the rollback rate.<sup>194</sup> The counties asserted that the election statute violated sections 1-a and 9 of the article VIII of the Texas Constitution.<sup>195</sup> The counties interpreted these provisions to grant commissioners courts exclusive authority to set tax rates<sup>196</sup> and to provide that such rates must remain in effect for the entire taxable year.<sup>197</sup> The court determined that section 1-a of article VIII of the Texas Constitution<sup>198</sup> does not grant exclusive authority to set tax rates to commissioners courts, but merely provides a limitation upon counties as to the amount of property taxes counties are authorized to levy.<sup>199</sup> The court also determined that article VIII, section 9 of the Texas Constitution<sup>200</sup> does not grant exclusive power to the commissioners court to levy property taxes, but merely limits the amount

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187. *Id.* at 825. The taxpayer also asserted that the mutual mistake exception applied because it would not have paid the tax had it known that the tax was unconstitutional. The court held that such a circumstance is a unilateral mistake of law, which is not an exception to the voluntary payment rule. *Id.* at 826.

188. *Id.* at 825.

189. *Id.*

190. *Id.* at 826.

191. 773 S.W.2d 263 (Tex. 1989). The Texas Supreme Court decision in *Vinson* affirmed *Winborne v. Commissioners' Court of Ellis County*, 757 S.W.2d 876 (Tex. App.—Waco 1988), *aff'd*, 773 S.W.2d 263 (Tex. 1989), and reversed *Vinson v. Burgess*, 755 S.W.2d 481 (Tex. App.—Fort Worth 1988), *rev'd*, 773 S.W.2d 263 (Tex. 1989). For a discussion of these prior decisions, see Ohlenforst & Dorrill, *Annual Survey of Texas Law: Taxation*, 43 Sw. L.J. 579, 602-3 (1989).

192. TEX. TAX CODE ANN. § 26.07 (Vernon 1982 & Supp. 1990).

193. 773 S.W.2d at 270.

194. TEX. TAX CODE ANN. § 26.07(a) (Vernon Supp. 1990).

195. TEX. CONST. art. VIII, §§ 1-a, 9.

196. 773 S.W.2d at 266.

197. *Id.* at 269.

198. TEX. CONST. art. VIII, § 1-a.

199. 773 S.W.2d at 267. In fact, the court noted that article VIII, § 1-a of the Texas constitution does not even use the term "commissioners court," and that the term "county" used in the section is not synonymous with the term "commissioners court." *Id.* at 266.

200. TEX. CONST. art. VIII, § 9.

that counties can tax.<sup>201</sup> Finally, the court held that article VIII, section 9 of the Texas Constitution,<sup>202</sup> providing that rates set by the commissioners court remain in effect for one year, was directive rather than mandatory.<sup>203</sup>

### E. 1989 Property Tax Legislation

The Texas legislature passed numerous important procedural and substantive property tax provisions during its 1989 regular session. Several of these legislative activities dealt with exemptions. On November 7, 1989, the voters of Texas approved a constitutional amendment (commonly called the freeport exemption) exempting from ad valorem taxation certain goods, wares, merchandise, other tangible personal property, and ores, other than oil, natural gas, and other petroleum products, that are located in Texas for no longer than 175 days.<sup>204</sup> The legislature added section 11.251<sup>205</sup> to the Tax Code to implement this constitutional amendment.<sup>206</sup> Both the constitutional amendment and the statute provide, however, that counties, common or independent school districts, junior college districts, and municipalities, including home-rule cities, may tax freeport goods for the tax year 1991 and beyond if official action to tax such property was taken before April 1, 1990.<sup>207</sup> Furthermore, such property may be taxed for the tax year 1990 and beyond if official action was taken before January 1, 1990.<sup>208</sup> A taxing authority that acts to tax freeport goods may subsequently exempt such property from tax by rescinding its action to tax the property,<sup>209</sup> but failure to tax such property by April 1, 1990, or a rescission of an action to tax such property, is irrevocable.<sup>210</sup>

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201. 773 S.W.2d at 268. The court was influenced by the section's reference to entities other than the commissioners court as having authority to set tax rates. *Id.* This reference is inconsistent with the counties' argument that article VIII, section 9 of the Texas Constitution grants exclusive authority upon commissioners courts to set tax rates. *Id.*

202. TEX. CONST. art. VIII, § 9.

203. 773 S.W.2d at 270.

204. TEX. CONST. art. VIII, § 1-j; see Tex. S.J. Res. 11, 71st Leg., 1989 TEX. GEN. LAWS 6415. In order for an exemption to apply to such goods, certain other requirements—listed in Section 11.251(a)(1) of the Tax Code—must be met. TEX. TAX CODE ANN. § 11.251(a)(1) (Vernon Supp. 1990). There are special rules for certain property owned or operated by certificated air carriers. *Id.* The chief appraiser determines the portion of a taxpayer's personal property that is classified as freeport goods by determining the percentage of the market value of property owned by the taxpayer in the preceding year that is freeport goods. *Id.* § 11.251(d). The constitutional amendment is a response to *Dallas County Appraisal Dist. v. Brinkman*, 701 S.W.2d 20, 23 (Tex. App.—Dallas 1985, writ ref'd n.r.e.), which held unconstitutional the statutory presumption under TEX. TAX CODE ANN. § 11.01 (Vernon 1982) that goods are presumed to be in interstate commerce if, among other conditions, the property is not located in Texas for longer than 175 days. 701 S.W.2d at 23. See also *Friedrich Air Conditioning and Refrigerator Co. v. Bexar Appraisal Dist.*, 762 S.W.2d 763 (Tex. App.—San Antonio 1988, no writ) (holding that the Dallas Court of Appeals in *Brinkman* should not have addressed the constitutionality of the freeport exemption).

205. TEX. TAX CODE ANN. § 11.251 (Vernon Supp. 1990).

206. Section 11.251 of the Tax Code became effective only if the constitutional amendment proposed by Senate Resolution 11 was approved by the voters. See *supra* note 203.

207. TEX. CONST. art. VIII, § 1-j(b).

208. *Id.*

209. *Id.* art. VIII, § 1-j(b)(4).

210. *Id.*

The Texas Legislature substantially modified Chapter 312 of the Tax Code,<sup>211</sup> which sets forth guidelines for tax abatement agreements between taxing units and taxpayers with respect to property located in a reinvestment zone.<sup>212</sup> The amendment to section 312.204 expanded the type of property that can be subject to abatement agreements to include tangible personal property, other than inventory and supplies, in addition to real property.<sup>213</sup> The period during which taxes can be abated by abatement agreements under Chapter 312 of the Tax Code cannot exceed ten years, whereas the prior law allowed the period of such abatements to last up to fifteen years.<sup>214</sup> Amended Section 312.206<sup>215</sup> of the Tax Code allows all other taxing units with jurisdiction over property subject to an abatement agreement with a municipality to accept or reject the abatement.<sup>216</sup> Under prior law, only counties and school districts could decide not to accept such abatement.<sup>217</sup>

The legislature also expanded section 11.14 of the Code<sup>218</sup> to exempt from ad valorem taxation all tangible personal property, other than manufactured homes, owned by a person that is not held or used for the production of income.<sup>219</sup> Prior to this amendment, section 11.14<sup>220</sup> of the Tax Code exempted only household goods and personal effects that were not held or used for the production of income.<sup>221</sup> In concert with enacting this amendment, the legislature repealed the exemption under section 11.25<sup>222</sup> of the Tax Code for automobiles owned by an individual or family and not used for the production of income.<sup>223</sup> Amended section 42.43(b)<sup>224</sup> of the Tax Code requires interest at an annual rate of eight percent to be paid on tax refunds resulting from suits against an appraisal district.<sup>225</sup> The interest is calculated from the tax delinquency date through the date the refund is made.<sup>226</sup>

Although there were many substantive property tax legislative changes

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211. TEX. TAX CODE ANN. §§ 312.001-.042 (Vernon Supp. 1990).

212. *Id.*

213. TEX. TAX CODE ANN. § 312.204 (Vernon Supp. 1990). This section also sets forth specific rules with respect to abatement agreements for property owned or leased by a certificated air carrier. *Id.* An abatement agreement cannot exempt tangible personal property that was located at any time before the period covered by the abatement agreement on the real property covered by the abatement agreement. *Id.* at § 312.204(a). Although inventory and supplies usually cannot be subject to abatement, a special provision with respect to airline carriers does not exclude inventory and supplies, so abatement agreements with respect to inventory and supplies of certain certificated carriers may be subject to abatement agreements. *Id.* at § 312.204(e).

214. *Id.*

215. *Id.* § 312.206 (Vernon Supp. 1990).

216. *Id.*

217. *Id.*

218. TEX. TAX CODE ANN. § 11.14 (Vernon Supp. 1990).

219. *Id.*

220. TEX. TAX CODE ANN. § 11.14 (Vernon 1982) (amended 1989).

221. *Id.*

222. *Id.* § 11.25 (repealed 1989).

223. *Id.* Special rules found in Section 11.14 of the Tax Code for boats were also repealed. See TEX. TAX CODE ANN. § 11.14(b) (Vernon 1982) (amended 1989).

224. TEX. TAX CODE ANN. § 42.43(b) (Vernon Supp. 1990).

225. *Id.*

226. *Id.* Under prior law, the interest accrued from the 60th day after a judgment was entered in the suit. See TEX. TAX CODE ANN. § 31.12 (Vernon Supp. 1990).

made in 1989, the number and scope of procedural changes was much more comprehensive. Many of these procedural changes are contained in House Bill 432,<sup>227</sup> which aimed to reform Texas property tax procedures and to clarify taxpayer rights. The legislature amended section 42.08(c)<sup>228</sup> of the Tax Code to provide that a taxpayer who appeals an order of the Appraisal Review Board or the Property Tax Board and tenders an amount of taxes greater than is required to appeal such order no longer forfeits its right to proceed with the lawsuit;<sup>229</sup> rather, such amounts are treated as paid under protest.<sup>230</sup> This legislation reverses case law providing that a court must dismiss a property tax suit if the taxpayer pays more than it is required to pay.<sup>231</sup>

The legislature relaxed the notice of appeal requirements dramatically. Under prior case law, if a party failed to file written notice of appeal within 15 days from the date it received an order denying relief from the appraisal review board, it could not appeal the order.<sup>232</sup> Under amended section 42.06<sup>233</sup> of the Tax Code, only a taxpayer whose property is valued in excess of \$1 million must file the notice.<sup>234</sup> In other cases, the taxpayer must file the notice, but failure to file will no longer forfeit a taxpayer's right to appeal; rather, a penalty of five percent of the tax finally determined to be due is imposed.<sup>235</sup>

The legislature amended sections 41.43<sup>236</sup> and 42.26<sup>237</sup> of the Tax Code to ease taxpayers' burden of proof to demonstrate that other property in the jurisdiction has been appraised more favorably. A protest on the ground of unequal appraisal shall be determined in favor of the taxpayer if it is established that the appraisal ratio<sup>238</sup> of the property at issue is greater than the median level of appraisal of either a reasonable and representative sample of other properties in the district or other properties that are similar in location and character to the taxpayer's property.<sup>239</sup>

Amended section 23.12<sup>240</sup> allows owners of inventory to elect between alternative dates to have such inventory valued for tax purposes—September

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227. Act of June 15, 1989, ch. 796, 1989 Tex. Sess. Law Serv. 3591 (Vernon).

228. TEX. TAX CODE ANN. § 42.08(c) (Vernon Supp. 1990). In addition, the rules for determining the amount of taxes that must be paid to appeal an order were simplified. *Id.* § 42.08(b).

229. *Id.* § 42.08(a).

230. *Id.*

231. See *Hunt County Tax Appraisal Dist. v. Rubbermaid, Inc.*, 719 S.W.2d 215, 218 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) For a discussion of the *Rubbermaid* case, see Ohlenforst & Dorrill, *Annual Survey of Texas Law: Taxation*, 42 Sw. L.J. 633, 654 (1988).

232. See *Towne Square Assoc. v. Angelina County Appraisal Dist.*, 709 S.W.2d 776, 778 Tex. App.—Beaumont 1986, no writ).

233. TEX. TAX CODE ANN. § 42.06 (Vernon Supp. 1990).

234. *Id.*

235. *Id.*

236. *Id.* § 41.43.

237. *Id.* § 42.26.

238. An appraisal ratio is the ratio of a property's appraised value to the property's market value (if the property is appraised according to a standard for market value).

239. TEX. TAX CODE ANN. §§ 41.43, 42.26 (Vernon Supp. 1990).

240. *Id.* § 23.12. The election applies to both real and personal inventory. *Id.*

1 of the prior tax year or January 1 of the current tax year.<sup>241</sup> Elections for a tax year remain in effect for future tax years until revoked.<sup>242</sup> A taxpayer's failure to make an election results in application of the January 1 valuation date.<sup>243</sup>

House Bill 432 also establishes numerous accountability, disclosure, and access requirements on appraisal districts,<sup>244</sup> provides additional limits on appraisal review board subpoena powers,<sup>245</sup> broadens taxing units' powers to waive penalties and interest,<sup>246</sup> establishes procedures for taxpayers to dispute rollback taxes,<sup>247</sup> and adopts less stringent criteria for granting standing to a taxpayer for protesting an assessment.<sup>248</sup> In addition, the bill generally prohibits a tax deficiency suit from being filed against a taxpayer who challenges a tax assessment,<sup>249</sup> shortens the mandatory reappraisal cycle,<sup>250</sup> simplifies the requirements for seeking court review,<sup>251</sup> and imposes nepotism and conflicts of interest standards on appraisal review boards.<sup>252</sup>

#### IV. TAX PROCEDURE

The legislature enacted a series of new provisions that deal with challenging taxes that are not administered by the comptroller,<sup>253</sup> and modified Tax Code provisions that deal with contesting taxes that are administered by the comptroller.<sup>254</sup> These procedural rules,<sup>255</sup> together with the amended procedures for challenging property tax assessments<sup>256</sup> and the pending cases

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241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* §§ 6.04, 6.052, 6.06, 6.062, 41.70 (Vernon Supp. 1990).

245. *Id.* § 41.61.

246. *Id.* § 33.011.

247. *Id.* §§ 23.46(c), 23.55(e), 23.76(e), 41.41.

248. *Id.* §§ 41.44, 41.45.

249. *Id.* § 42.08(a).

250. *Id.* § 25.18.

251. *Id.* § 42.21.

252. *Id.* §§ 6.035, 6.036, 6.05, 6.412, 6.413.

253. *See* TEX. GOV'T CODE ANN. §§ 403.203-.221 (Vernon Pamph. 1990). These additions to the Government Code add specific procedures for taxpayers to pay taxes under protest and file suit within 90 days of the protest payment. *Id.* §§ 403.202-.206. *See also* TEX. TAX CODE ANN. § 112.051 (Vernon 1982 & Supp. 1990) (pre-existing similar procedures for taxes administered by the comptroller). Taxpayers are now required to pay additional taxes as they become due prior to hearing and during appeal. TEX. GOV'T CODE ANN. §§ 403.207-.208; TEX. TAX CODE ANN. § 112.057 (Vernon Supp. 1990). As revised, the Government Code also sets forth specific procedural requirements for refund claims with respect to certain taxes not administered by the comptroller. *See* TEX. GOV'T CODE ANN. §§ 403.076-.078 (Vernon Pamph. 1990). Other revisions to the Government Code affect injunction proceedings with respect to certain fees and taxes. *See id.* §§ 403.212-.221.

254. *See, e.g.,* TEX. TAX CODE ANN. § 112.052 (Vernon 1982 & Supp. 1990) (protest suit and state counterclaim); *id.* § 112.057 (taxpayer must continue to pay taxes under protest during appeal); *id.* § 112.151 (procedural requirements for refund suits). The legislature also revised requirements with respect to injunction proceedings. *See id.* §§ 112.101-.108.

255. *See also* 34 TEX. ADMIN. CODE § 1.3 et seq. (comptroller's rules of practice and procedure).

256. *See supra* notes 227-239 and accompanying text.

concerning the duties of a taxing authority to pay refunds,<sup>257</sup> ensure that the procedural requirements for contesting taxes will continue to be the subject of much debate.<sup>258</sup>

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257. *See supra* note 14 and accompanying text.

258. Taxpayers planning to contest state taxes must also take into account the fact that the legislature has expanded the state's authority to file counterclaims. *See, e.g.*, TEX. TAX CODE ANN. §§ 112.052, 112.1512 (Vernon Supp. 1990).



